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Some limiting thoughts on contemporary criminal law

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Abstract: This work seeks to shed light on the limitations of punishment in contemporary criminal law. The principles of criminal law, the need for reforms, integration at a European and international level provide greater protection of the interest which are elements of limitation of criminal law. Ultima ratio, fragmentation, subsidiarity, administrativeization of law, limits of punishment and prevention are some of the topics, that every democratic state that protects human rights and its citizens from any type of crime, the present work takes into consideration.

Keywords: ultima ratio; subsidiarity; prevention; telological interpretation; harmfulness, interpretation of crimes; crime theory.

Introduction

The continuous development of technology and criminal law to a form that is now not domestic but of international and global

level has as a consequence the influence of its own administrativeization which is in contrast with the principles of subsidiarity and fragmentation.

Thus, crimes are created which punish in a commercial, labor and administrative manner every typology of lawful conduct at an extra-criminal level such as for example in the business sector or private corruption, thus sanctioning unfair competition as well as commercial legislation as illicit behaviour. The use of similar and open types such as preparatory and consummated acts in the area of authorship and participation are now phenomena of daily use for a series of crimes on a global level.

Reducing the enforcement and expansion of crime today is a long and evolving debate. Thus, proposals are developed that limit the situation of criminal law by taking into consideration the judicial application of the principles that limit it, as final objectives of contemporary criminal law.

There is no lack of need for reforms and at the same time also integration at a European, transnational level, providing data to support the deficit of the usefulness that each case and aggravated circumstance can have to protect an interest, a legal good for society in the historical and cultural moment.

The effectiveness of resolving, reducing any conflict and carrying out an investigation into existing crimes and repetitively avoiding contradictions by moving away from the

point of view of legislative techniques now involves a practice of application.

Legislative reforms are sufficient for the formulation to create and superimpose precedent. From this point of view, the difficulties encountered by legal practitioners in resolving issues relating to problems of complicity in crimes which are often unsolvable are explained. Illicit associations, criminal organisations, various forms of mafia are types of crimes in a market where consumers serve in a theoretical way to protect free competition for consumers. New criminal cases improve, adapt the existing ones to current problems to abolish the precedents by creating new ones that contemplate similar situations, reaching the point of talking about the protection of a criminal legal asset as a systematic interpretation and the related evidence in each specific case as a protected and criminal legal asset in this case as a teleological interpretation. The principle of offensiveness is sufficient for the typical elements proving the circumstances that are concomitant ex ante, ex post to any damage to a legal asset that is considered to be protected. To every legal event that is present in every attempt to commit the crimes of events where the conduct of crimes against individual legal assets are also considered supra-individual.

The influence of the victims and their field of action is constantly evolving, thus preventing revenge which constitutes

criteria for determining the punishment in the legislative and also the judicial moment.

The explicit or tacit retribution encourages the criminal law as well as the victims to stop being found in the greater punishment that is imposed on the offender. The victim finds himself in a status where protection in that direction is an attempt that complements this condition. The victims dictate the political-criminal agenda towards a total contempt towards the experts and the casuistic solutions allow us to give names and surnames to certain types of crimes. This opens up a secondary victimization that could have been avoided and the victims will have to be compensated and helped when necessary.

The interpretation of crimes in contemporary criminal law and the protection of legal assets shuns formal applications and favors functional positions that are linked to the validity of each law and the administrativeization of criminal law. The principle of offensiveness is now linked to the anti-juridical material of the typical nature of the violation of non-criminal rules as well as to iuris et de jure presumptions. The principles of this type of ratio, i.e. subsidiarity and fragmentation, are linked to the principle of offensiveness which respect the interpretation of the cases at a legislative and judicial level.

The continuous expansion of contemporary criminal law in an exclusive way and in various criminal cases and in abandoning

the path of the theory of crime by the national, European and international legislator as well as by those who apply it neglect the principles that delimit the application of the criminal law. The principle of subsidiarity is essential for the administrativeisation of criminal law, for the violation of the principle of proportionality under the aspects of necessity, proportionality in the strict sense, adequacy and principle of offensiveness, thus ignoring the essential function of the protection of criminal legal assets.

Subsidiarity and fragmentation, principles of ultima ratio and limits to punishment

Criticizing the legal good as well as the related theories of criminal law allow us to speak of a crisis of the principles of fragmentarity, subsidiarity of the ultima ratio. Theories of retribution have not resolved the preventive effects of punishment through limits, thus attributing functions unrelated to retribution. In a democratic, secular state it is not considered that the function of criminal law punishes the prevention of infringement of criminal legal goods, i.e. the essential values of a specific community.

In retribution theories, the criminal responsibility of the offender is defined by moral philosophers (Robinson, 2014; Pickett, 2019). The objective of punishment is characteristic of religions

that have Judeo-Christian roots and of absolute states being in a modern state. The continuous suffering of citizens and holders of fundamental rights is not a function of the state that resolves the theories of retributions that are very close to Kant's theories that affirm suffering for the need for justice (Kant, 1798).

In particular, Lesch defines punishment as:

"(...) harm that is inflicted on a person in a general public proceeding, carried out by the state, formal and desired, to the extent that a violation of a legal rule has occurred, if this violation must be attributed to that person as a reproach (…)" (Lesch, 1999).

For Mir Puig:

"(...) punishment conceptually is and must be a punishment, this does not imply that punishing a citizen is the function that a social and democratic state of law must exercise (...)" (Mir Puig, 2016).

According to the theories of the neo-retributionists who are inspired by Hegel's theories:

"(...) punishment understood as confirmation of the validity of the norm or as re-establishment of the law (...)".

For Welzel:

"(…) defenders of general positive prevention (…) relates the retributive theory to the validity of the norm, arriving at what would be a form of retribution (…)" (Welzel, 1969).

On the other hand for Frisch:

"(…) the only legitimate purpose of punishment is to guarantee a certain rule of law, its validity and its imperturbable character (...) conceiving the purpose of punishment as an affirmation of the validity of the rule is a formal theory that could be legitimate and constitutional if it could be assumed that this rule responds to the essential values of a given society and respects the principles of ultima ratio and proportionality (...) if we start from the fiction that, in a democratic state, the rules issued by the legislative power respond to these priority interests of the citizens, that the aforementioned principles have been respected and that a correct legislative technique has been followed, it could logically be deduced that this rule is legitimate and constitutional (...) this cannot imply that the rule must be formally applied, without the need to be

interpreted, in relation to the criminal-legal good it intends to protect and/or to the constitutional principles, according to the positions that derive criminal law directly from the Constitution (...) the affirmation of the validity of the norm as the purpose of the punishment, establishing its legitimacy, even when it is placed in general positive prevention, leads us to retribution, if it is not limited by the material content (…) this defends the theory of the validity of the norm as the only valid one, but, as we will see, it completes it by introducing requirements close to deservingness and the need for punishment (...)" (Frisch, 2014).

Hörnle/Von Hirsch believe:

"(…) defending a retributionist theory and express their doubts about the fact that society's sense of justice can be influenced by criminal law, underlining that this theory is based on the premises of the theory of retribution (...) in the theory of the validity of the norm the explicit reference to "inflicting an evil" is eliminated, but this is replaced by the idea that for every norm violated one must respond with a sanction, which implies an "evil" (…). This is another form of realization or demand for justice. Unlike retributive theories, preventive theories are utilitarian, as is the principle of ultima ratio, in the sense that maximum well-being should be sought at the lowest individual and social cost (...)" (Hörnle, Von Hirsch, 1995).

For Mir Puig:

"(…) the principles of ultima ratio, subsidiarity and fragmentarity, based on the concept of punishment, should be respected not only in the creation of cases, but also in the quantity and type of punishment provided for the different crimes, that is, in the abstract punishment and, above all, in its concrete determination (Hernàndez, 2011; Demetrio Crespo, 2016). The punishment must be established on the basis of its preventive purposes, but without forgetting that, precisely to satisfy these purposes, must effectively result in punishment, taking into account the type of crime and the criminological profile of its perpetrators, always respecting the principle of proportionality, in the broad sense - necessity, adequacy and proportionality in the narrow sense. In socio-economic crimes, in many cases, a fine may not be appropriate because it does not imply punishment, especially when, in the execution of the penalty of the fine, at least in Spain, the principle of personal responsibility is forgotten and the payment is assumed by third parties or by the company, who have the possibility of passing it on to prices or losses, reducing profits and therefore corporation tax (...) the alleged perpetrators are able to carry out a cost-benefit analysis to establish whether it is "advantageous" for them to run the risk of being punished (...) cannot be a solution to limit the expansion of criminal law and apparently respect the principle of ultima ratio, provide for the punishment of deprivation of liberty

only with regard to the so-called nuclear criminal law (…). In order to limit the expansion of criminal law, propose that socioeconomic crimes should not be punished through penalties depriving personal liberty (…)" (Silva Sànchez, 2011).

As can be understood from the positions held in the following paragraphs, the ultima ratio, criminal law intervenes when it is strictly necessary in terms of social utility and achieved in today's complex society on a global level, thus limiting criminal law to the protection of subjective rights and as supporters of minimum criminal law, recalling the case of theft which is punishable and tax fraud constitutes an administrative offense for some national legislators (A.A.V.V. 2011). Replace criminal law with sanctioning administrative law and with fewer guarantees do not respond to the society that finds itself at risk and intends to punish less the reduction of constitutional guarantees and/or criminal law that harms the people involved (Corcoy Bidasolo, 2011).

The intervention is rigorous, safe and above all necessary starting from the assumption that in a social and democratic state of law the constitution is an essential element for determining protection.

Limits to prevention

Prevention theories remain valid and respect the limits of criminal law and do not use one's intervention as legitimate. Theories of punishment offers a complete and complementary

answer to put the crux of the matter and the state's obligation to protect criminal legal assets as the purpose of punishment and the function of criminal law.

In the same spirit Pérez Manzano states:

"(...) between the protection of legal assets as the ultimate goal of the punishment and the mediated or intermediate goals that correspond to the purposes of the punishment and the necessary legitimation of its imposition, in the specific case, based on the commission of an illicit act as a foundation and on personal responsibility, as in the principle of ultima ratio, when new criminal cases are introduced or existing ones are aggravated (...)" (Pèrez Manzano, 1999).

The idea of the legal good is used despite the various opinions in an indispensable way for contemporary criminal law. Thus Mir Puig states that:

"(...) in a democratic society (...) the legal good does not have the ability to limit the intervention of criminal law, basing this objection on the current expansion of the same (...) do not protect any legal good, thus implicitly admitting their usefulness (...) the expansion is undeniable and criticizable, it cannot be attributed solely to the concept of legal good, but, on the contrary, to the fact that it is not taken taken into consideration by the legislator (...) if conceived as a legal-criminal good (...) the principles of ultima ratio and subsidiarity are violated and a legislative technique that ignores the existence of the General Part of Criminal Law resorts to casuism, administrativeizing criminal law (…)" (Appel, 1999; Feijoo Sánchez, 2010).

The administrativeization of criminal law in a non-exclusive way intervenes in new areas due to the failure to introduce criteria in the crime cases which qualitatively and quantitatively delimit the administrative, tax, commercial and labor offence, and thus respecting criminal law.

Duplicating sanctions in criminal law limits its intervention to forms of conduct that are offensive, thus respecting the principle of proportionality ad extram and ad intra. Thus the principles of

ultima ratio and subsidiarity are relevant to new areas in which criminal law intervenes. The need to defend minimum criminal law is possible for criminal law that punishes conduct in areas where there is administrative, civil, commercial and labor regulation. This duplicity of a sanctioning nature already exists in public administration crimes and justice in matters of public order. In new and traditional crimes, the solution is not criminal law which must intervene but the limitation to a greater extent of new crimes that respect the principles together with that of fragmentation. This is how serious conduct is punished in other areas of a legal system that no gaps in punishability are noted. The offensiveness and the absence of some cases to a presumed legal good as in the case for example of animal abuse violate criminal law as well as the principle of guilt that punishes ideas or hate crimes (Gòmez Martin, 2021). Hate crimes are, in our opinion, the only elements for one's evaluation: the issuing of provocative, violent discriminatory messages with the effects that are contemplated by spreading knowledge of their content, the commission of a crime in abstract danger and sufficient for a potential danger that the widespread message entails. Thus the principle of offensiveness allows the sufficiency of this potential danger which does not take into consideration the circumstances and the danger that are referred to in an exact manner.

The conduct is not suitable for damaging the legal good which protects as in the case of child pornography and punishes conducts on a statistical basis for crimes that are formal such as driving without a license and the need to prove that the criminal legal good protects a specific case. This situation does not demonstrate the ineffectiveness of the legal good and limits criminal intervention at a legislative and judicial level, contrary to the necessity which demonstrates the relevance in respecting the principles that have a limiting function, thus introducing new criminal cases, aggravating those that already exist.

Crime as an "organ" of limiting criminal intervention

Forgetting the retributive theories and the adoption of preventive theories that lead to the abandonment of the objective factual conception of the crime which are independently of the theory of punishment makes the criminal conviction to be legitimate and to satisfy certain conditions. In this way, the typical offense that has to do with the interference of legal-criminal goods is satisfied. The subject is motivating the rule of a subjective type, i.e. a typical offense that is the cause of justification of anti-legality. The punishment does not legitimize the confirmation of the validity of the law and the restoration of the law but the possibility of justifying that citizens do not offend the legal-criminal goods. The essential differences between confirmation

of the validity of the law and the protection of criminal legal assets are part of the fact that the law responds to the need, adequacy and creation of protection of a specific asset that is legal. This rule is interpreted teleologically, demonstrating that the facts are suitable ex ante and ex post to harm and affect criminal legal assets which are protected by the rule even in crimes of danger and mere conduct. The validity of the law favors a formal conception of anti-legality and the reference to a criminal legal good respects the material anti-legality of the principle of offensiveness.

Thus punishment is based on a conduct and not on an event. It is punished to re-establish the previous situation of the offense to a subjective right to repair the damage and to punish appropriate conduct, ex ante-post facto affecting criminal, individual and supra-individual legal goods. Repairing the subjective right and the damage thus providing for civil liability for crime. The objective of the law is to motivate the citizen not to engage in offensive behavior regardless of the fact that it gives rise to an offensive event. The typical offense is committed ex post by taking into consideration the relevant ex ante circumstances, demonstrating that the conduct was suitable for affecting or offending a criminal legal asset that protects that specific case. This approach does not exclude the need for punishment as a lesser punishment which does not give rise to an event which is

objectively attributable to such conduct which is not punished but in consideration of the lesser capacity which motivates the rule as in negligent crimes. It remains inadmissible for the penalty to be increased or based exclusively on an event that justifies compensation for the damage and which implies the qualification of the event as a form of objective liability.

Continuing, defending preventive theories from retributive ones are added to the rise of victimology which does not lead citizens to understand the punishment of a just response to an offensive event and leads the legislator to punish the extent of the offense. After the rise of preventive theories, there are still crimes that are qualified by the event, relevant as crimes of injury and the punishment of attempted and dangerous crimes justify the space for attempted crimes of injury. The lack of a direct victim and the intervention of criminal law is not necessary if the conduct is serious, offensive in society as a whole. A theme arises in relation to subjective responsibility given that there is a tendency to objectify the crime implying the presumption of existence of intent and fault. Strict liability is not confused with the objectification of intent but it is only a fact that proves on the basis of objective evidence. The normative conception of intent does not exclude evaluations of a psychological nature in the evidence and the knowledge of the existence of intent considers the criminal proceedings and the causation of the event to be

sufficient. It is assumed that the existence of malice based on the character profile of the author is not always traceable and real.

The principle of ultima ratio is linked to the principle of minimum intervention which is confused with minimum intervention and conceived within the parameters of minimum criminal law. Respecting the principle of ultima ratio does not mean affirmation of criminal law which protects subjective rights, i.e. freedom, private property, life, health, implying that the offensiveness of the conduct is typified. Crime of a socio-economic nature is not part of criminal law as a justification that forgets its offensiveness for society and of most of the crimes of a classic nature against property. The crimes in accumulation and the conduct that does not damage the protected legal asset implies and discusses that the offense of the legal asset is a tax crime that destroys the heritage of offensiveness. Crimes that are part of the list of crimes at risk viewed as a typification of conduct that is offensive.

The symbolic nature of these crimes are acceptable and have an exclusive symbolic function. Thus they contribute to the protection of criminal legal assets which are not rejectable but appropriate for positive and general prevention. The symbolic character is relevant for a society that is not aware of the importance of the protected criminal legal asset and the offensiveness of such conduct. This is the case of tax and

environmental crimes where the intervention in these areas is legitimate and punishable by the most serious facts which are not sufficient to sanction according to extra-criminal instruments as can be seen in the tax areas with the accounting crime and/or in areas where the type of deposits and waste are thrown away legally or not.

A specific conduct takes into consideration its offensiveness and the regulations that exist in other sectors of the legal system where the effectiveness of this crime respects the extra-criminal rules. The evaluation and effectiveness cannot be done in economic terms but on the parameters that are linked to offensiveness. Effectiveness does not only analyze the basis given that jurisprudence only punishes minor crimes as seen in environmental crimes which are not applied to tax crimes as has been noted in the past in various European countries. Some crimes is not in itself a valid explanation of the ineffectiveness of this type of crime which depends to a large extent on the political will of the instruments that prosecute this type of crime adequately. The establishment of specialized prosecutor's offices that have the means to investigate could be a right step in the direction and the existence of courts specialized only in crimes of a socio-economic nature.

The principle of ultima ratio with the principle of subsidiarity is interpreted with the conduct that is serious and foreseen in the

extra-criminal sphere. The criminal sanction is severe and extra criminal and in the case of fines where the administrative sanctions are very high. The principle of fragmentation in this circle as a sub-principle of ultima ratio has as its scope the evaluation of conduct which is suitable for affecting a specific criminal legal good and which must be punished. Analyzing the relationship of a specific crime which involves a legal asset means the existence of an extra-criminal sanction appropriate to punish the temptation to commit guilt and the complicity of the relevant accomplice. Of course, the principles are taken into consideration by the judge at the moment of application, thus respecting the principle of ne bis in idem while also evaluating the aggravating circumstances.

Conclusions

The prevention of purpose in punishment limits the various principles of criminal law as we have seen in the previous paragraphs. This is a reality of every democratic state where law is indispensable for respecting the fundamental rights of individuals. These principles and especially the ultima ratio are violated at a legislative and judicial level and in some cases are consistent with the presentation and application consequences which are contrary to a criminal law that respects the principle of minimum intervention. Beyond the limits established by the

principles, every successful criminal policy is based on criminological studies and cost-benefit analyses, interpreting this path only in economic terms. This implies the legislating of an irrational way when the attention of public opinion arises. There are now many crimes, there are many criminal codes at a national level and from a European and international point of view we are full of rules, laws of a mandatory nature to deal with various types of crimes in the societies we live in.

The expansion of criminal law is undeniable and reversible by respecting the principles of ultima ratio, subsidiarity and fragmentation as well as proposing legislative reforms that deal with conduct that is criminally relevant. Also adopting other measures thus seeking to replace penalties which deprive citizens of their sphere of freedom means that at the time of application in the judicial context, the protection of legal-criminal assets must be taken into consideration for the carrying out of a teleological interpretation of crimes. The objective is to deny the criminal relevance of a conduct to formally satisfy the letter of the case which is not suitable ex post to damage the criminal legal good that is protected. The requirement of material anti-legality, the principle of offensiveness allows the reduction of criminal intervention and compliance with the principle of ultima ratio. Presumptions even of a hypothetical, presumed danger and/or even the precautionary principle are

valid in the administrative field and must be excluded from criminal law.

From a legislative and judicial point of view, the theory of crime plays an important role in guaranteeing legal certainty and in ensuring compliance with the principle of culpability in its aspects of responsibility for the act as well as subjective responsibility and relative culpability in a restrictive, rigorous sense. It is obvious that within this context the theory of crime is useful for giving an impulse to facilitation in compliance with the principles of proportionality and the sub-principles of the principle of ultima ratio, i.e. subsidiarity and fragmentarity and to the extent that it establishes the categories that allow the distinction between conduct of authorship and participation between preparatory acts, of temptation and consummation between and after and guilt. These are distinctions that the legislative technique disappears given that new precepts incriminate numerous conducts i.e. promotion, encouragement, instigation directly with indirect means. This means that consumption, attempt and preparatory acts, authorship and participation are punished with the same punishment. Forgetting the general part does not mean equating behaviors with disvalues which are different but has as a consequence numerous aggravating circumstances of a specific nature which in many cases give rise to serious conflicts which respect the

principle of ne bis in idem.

The ex ante perspective for the analysis of the facts gives an answer to the preventive function of criminal law which allows legal operators of all capacities not to be influenced and to take into consideration the seriousness of the conduct. The theory of the crime does not provide solutions to behaviors that are punishable The legislative technique follows the special part even in a disproportionate and often irrational way and as a consequence eventual solutions tend to have an arbitrary nature.

For the proper functioning of criminal law and to avoid the legislator being criticized by public opinion for increasing penalties and introducing new criminal cases, we need effective justice at all levels, both domestic, European and international, based on a criminal trial that is combined with speed, efficiency and guarantees. We need excellent jurists in every capacity as well as the relevant means to not be influenced by politics. Furthermore, the guarantees and execution of sentences as well as the execution oriented towards one's reintegration are critical elements taken into consideration by every democratic state that protects human rights. The preventive effectiveness of punishment does not depend on severity. The increase in penalties and their certainty of application on processes where execution plays an essential role, are the right, fair path of legitimation of contemporary criminal law.

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